In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-142

H. B. GREGORY COMPANY
AND
JAMES H. GREGORY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend:

(1) that the foods described in the information filed against them were not "adulterated" within the meaning of Section 402 of the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040 *et seq.*, as amended, 21 U.S.C. 342;

(2) that the four-count information charging that they had violated Section 301(k) of the Act, 21 U.S.C. 331(k), by causing four different types of food to become adulterated was duplicitous;

(3) that the president and treasurer of a corporation who is personally in charge of its sanitation program, including its rodent control program, cannot be held criminally liable under Section 301 for the adulteration of food in the corporation's warehouse resulting from the presence of rodents; and

(4) that the district judge erred by telling petitioner James H. Gregory at sentencing that if he violated the Act in the future he would be imprisoned.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners were each convicted on all four counts of an information charging them with having caused four different foods to become adulterated, in violation of 21 U.S.C. 331(k). The petitioner corporation was sentenced to a fine of $1,000 on each count, for a total of $4,000, and Mr. Gregory was sentenced to a fine of $500 on each count, for a total of $2,000 (Pet. App. A2-17—A2-20). The court of appeals affirmed (Pet. App. A1-1—A1-15).

The information charged that H. B. Gregory Co., a Wisconsin corporation which supplies ingredients to bakeries throughout the Milwaukee area and operates a bakery supply warehouse, and its president and treasurer, James H. Gregory, violated 21 U.S.C. 331(k) by receiving foods that had been shipped in interstate commerce, holding such foods for sale in their warehouse following the interstate shipment, and, because their warehouse was infested by rodents, causing the foods to become adulterated.

Count 1 of the information charged that bags of cornmeal were adulterated because they consisted in part of a filthy substance, *i.e.*, rodent excreta (21

U.S.C. 342(a)(3)), and because they were held under insanitary warehouse conditions whereby they may have become contaminated (21 U.S.C. 342(a)(4)). The remaining three counts of the information charged that three other types of food—poppyseed (count 2), caraway seed (count 3) and corn grits (count 4)—were adulterated because they were held under insanitary warehouse conditions whereby they may have become contaminated.

The facts are set forth in the opinion of the court of appeals (Pet. App. A1-3—A1-6) and are not in dispute. The evidence established that the foods in question had been shipped in interstate commerce and were being held for sale in the company's warehouse. An inspector from the Food and Drug Administration testified that he inspected this warehouse and found extensive evidence of rodent infestation, which was later confirmed by laboratory analysis. Apart from the general insanitary condition of the warehouse, the inspector testified that 75 percent of the small rodent traps in the warehouse were unbaited.

During his inspection, the FDA inspector discussed the insanitary conditions of the warehouse with Mr. Gregory, who said that he was president and treasurer of the company and that he was at the firm "on a daily basis" and was personally in charge of the sanitation program, including the rodent control program.

The defense rested without presenting any evidence, and the district court found both petitioners guilty on all counts.

The court of appeals, one judge dissenting in part, affirmed the judgments of conviction. The court held as to each count of the information that the food was adulterated because it was held under insanitary warehouse conditions whereby it may have become contaminated, and that the cornmeal in Count 1 was also adulterated because it consisted in part of a filthy substance (Pet. App. A1-1—A1-8). As to Mr. Gregory's responsiblity under the Act, the court held that he was criminally liable under the standards set forth in *United States* v. *Dotterweich,* 320 U.S. 277, in that he shared responsibility in the business process resulting in the violation. The court expressly rejected his contention that this standard of criminal responsibility is improper (Pet. App. A1-8—A1-10). Finally, the court stated that the four-count information charging petitioners with receiving foods and permitting them to become adulterated within the meaning of Section 402(a)(4) of the Act was not duplicitous, because each count of the information referred to a different food (Pet. App. A1-10—A1-11).

Judge Campbell agreed that the food was adulterated and that petitioners were criminally responsible under the Act, but dissented in part because he believed that the information was duplicitous and that petitioners were guilty of only two offenses.[1] Under his interpretation of the Act, if the government charges three separate offenses under Section 402(a)(4) because three different kinds of food are being held for sale, but proves only one insanitary condition, then there has been only one violation of the Act (Pet. App. A1-12—A1-14).

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[1]Under Judge Campbell's interpretation of the Act, petitioners would be guilty of one offense under Count 1 of the information in that the cornmeal was adulterated within the meaning of Section 402(a)(3). The remaining three counts of the information would have constituted the other offense.

1. The third question presented in the petition for a writ of certiorari—whether criminal liability could properly be imposed upon a corporate executive under the facts of this case—is similar to one of the questions presented in the government's pending petition for a writ of certiorari in *United States* v. *Park*, No. 74-215. Although we believe that question to have been correctly decided in this case, the Court may wish to defer action on the present petition until the disposition in *Park*. The remaining questions presented were correctly decided below and do not raise any issue warranting further review.

2. Petitioners contend that the food was not adulterated because the rodent excreta did not exceed the tolerances established pursuant to Section 406 of the Act, 21 U.S.C. 346. Section 406 is not relevant to the adulteration questions in this case. Section 402(a) of the Act, 21 U.S.C. 342(a), defines seven types of adulterated food, including food containing any added poisonous or added deleterious substance which is unsafe within the meaning of Section 406 (402(a)(2)), food containing filthy substances (402(a)(3)), and food held under insanitary conditions (402(a)(4)). Section 406 tolerances are applicable only in determining whether food is adulterated for purposes of Section 402(a)(2), concerning added poisonous or deleterious substances. The charges in this case alleged that all four kinds of food were adulterated within the meaning of Section 402(a)(4) and that the cornmeal was adulterated within the meaning of Section

402(a)(3). The information did not contain any allegation of adulteration in violation of Section 402(a)(2). Accordingly, there is no question of Section 406 tolerances in this case.[2]

3. The court of appeals correctly held that the four-count information was not duplicitous. Section 402 (a)(4) of the Act states that "[a] *food* shall be deemed to be adulterated * * * if it has been * * * held under insanitary conditions whereby it may have become contaminated * * * " (emphasis supplied). Each count of the information referred to a different food that had become adulterated within the meaning of this section. The criminal offense prohibited by Section 301(k) of the Act is the doing of any act with respect to "a food" which results in the food becoming adulterated as that term is defined in Section 402. Therefore, the express language of the Act imposes criminal liability for each particular food that becomes adulterated. See *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86;[3] *Akin Distribs. of Florida, Inc.* v. *United States*, 399 F. 2d 306, 307 (C.A. 5); cf. *V.E. Irons, Inc.* v. *United States*, 244 F. 2d 34, 45-46 (C.A. 1), certiorari denied, 354 U.S. 923; *Robinson* v. *United States*, 366 F. 2d 575, 579 (C.A. 10), certiorari denied, 385 U.S. 1009.

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[2]FDA has also established "defect action levels" for purposes of providing administrative guidance in enforcing Section 402(a)(3). See Current Levels for Natural or Unavoidable Defects in Food for Human Use that Present No Health Hazard, Department of Health, Education, and Welfare (March 1974). The so-called "tolerance" quoted in the petition (p. 4) is in fact a "defect action level." The defect action level guidelines are not applicable to prosecutions for Section 402(a)(4) adulteration. 21 C.F.R. 128.10(c).

[3]In *Wiesenfeld* this Court reversed the dismissal of a six-count information. Each count alleged that the food described therein was adulterated because it may have become contaminated through storage in an insanitary warehouse. The Court noted that the counts differed "only with respect to the particular shipment or product involved." 376 U.S. at 87, n. 3. The opinion does not expressly discuss any question of duplicity.

4. The district judge's statement that further violations by Mr. Gregory would result in imprisonment does not warrant consideration by this Court. The statement merely reflects the trial judge's present thought with respect to action he would be likely to take in a hypothetical future case, which, if it even arises, might well not be assigned to him. Moreover, the statement is not improper. A trial judge can comment upon the defendant's conduct at the time of sentencing. *Page* v. *United States,* 462 F. 2d 932, 934, n. 2 (C.A. 3); *Jordan* v. *United States,* 370 F. 2d 126, 128-129 (C.A. 10), certiorari denied, 386 U.S. 1033; *Montgomery* v. *United States*, 344 F. 2d 955 (C.A. 10); *Simmons* v. *United States*, 302 F. 2d 71, 77 (C.A. 3). The comment was within the discretion of the district judge and did not invalidate either the judgment of conviction or the sentence.[4] *Montgomery* v. *United States, supra.* In addition, Mr. Gregory did not receive the maximum penalty provided in Section 303 of the Act , 21 U.S.C. 333 (Pet. 4).

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[4]A careful examination of the trial transcript does not reveal any evidence of bias on the part of the district judge. If Mr. Gregory believes that Judge Gordon would be prejudiced against him in a future trial, his remedy is to request the district judge to recuse himself at that time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied. As to question 3, however, the Court may wish to defer action until its disposition of *United States* v. *Park, supra.*

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